

METROPOLITAN AREA TRANSIT, INC

CONTRACT NO. V618P-2930a

VABCA-7022

**VA MEDICAL CENTER
MINNEAPOLIS, MINNESOTA**

William L. Lucas, Esq., William L. Lucas, P.A., Attorney At Law, Edina, Minnesota, for the Appellant.

Merilee Rosenberg, Esq., Trial Attorney, ***Phillip S. Kauffman, Esq.***, Deputy Assistant General Counsel; and, ***Phillipa L. Anderson, Esq.***, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE KREMPASKY

This appeal, timely filed by Appellant, Metropolitan Area Transit, Inc. (MAT), results from the Respondent, Department of Veterans Affairs (VA or Government) denial of MAT's claim that the VA breached Contract No. V618P-2930a (Contract) by utilizing other sources for transportation of handicapped patients and because of the VA's negligent estimate of the level of handicapped transportation services that would be ordered under the Contract.

The record before the Board consists of the Pleadings; an Appeal File (cited as R4, tab __) consisting of 36 exhibits; two exhibits introduced into evidence by MAT (cited as Exh. A-__); three exhibits introduced into evidence by the VA (cited as Exh. G- __); the Joint Comprehensive Prehearing Statement of Facts (cited as Exh. J-1); the transcript of the hearing held in Minneapolis, Minnesota (cited as Tr. p. __); and, MAT's MAIN and REPLY BRIEFS (cited as MAT MAIN or REPLY, p. __) and the VA RESPONSE BRIEF (cited as VA RSPNSE, p. __). Both entitlement and quantum are before the Board.

FINDINGS OF FACT

The VA issued Request For Proposals (RFP) No. 618-08-00 for "Transportation of the Handicapped" at the Department of Veterans Affairs Medical Center in Minneapolis, Minnesota (VAMC Minneapolis) and the Twin Ports Outpatient Clinic (TPOPC), a satellite facility of VAMC Minneapolis, on July 21, 1999. The VA sought proposals for transportation services for the base Federal Fiscal Year (FY) of October 1, 1999 through September 30, 2000 (FY 00) and four succeeding FYs as option years. MAT was awarded the Contract on September 3, 1999 for the base year for an estimated price of \$859,834. (R4, tabs 5, 36; Jt. Exh. 1)

The Contract was an indefinite delivery/indefinite quantity (ID/IQ), requirements contract under which MAT would, as stated in the Contract Schedule, furnish all "Transportation for the Handicapped (Primarily Wheelchair)" patients at VAMC Minneapolis and TPOPC. As required by the RFP, MAT priced four separate aspects of the transport services: Base Rate; Mileage; Additional Driver/Attendant Needed To Transfer Patient; and, Waiting Time Beyond 15 Minutes. The Contract estimate for the number of Wheel Chair

trips to be performed at VAMC Minneapolis was 13,750 per year for the base year and each of the option years, the Contract mileage estimate for each year was 470,000. The TPOPC Contract estimates were 380 trips and 19,200 miles per year, respectively, for each of the base and option years. MAT's proposed per trip price for both locations was \$29.00 and its rate per mile was \$.92; MAT's offered price for the Additional Driver/ Attendant and Waiting Time price items at both locations was "no charge." The estimated total Contract price for each year was \$859,834. (R4, tabs 5, 12, 36)

The Contract includes the standard Federal Acquisition Regulation (FAR), 48 C.F.R. Chapter 1, and Department of Veterans Affairs Acquisition Regulation (VAAR), 48 CFR Chapter 8, clauses prescribed for ID/IQ contracts, including the following clauses relevant to this appeal:

CONTRACT TERMS AND CONDITIONS – COMMERCIAL
ITEMS, FAR 52.212-4 (MAY 1999)
ORDERING, FAR 52.216-18 (OCT 1995)
ORDER LIMITATIONS, FAR 52.216-19(OCT 1995)
REQUIREMENTS, FAR 52.216-21 (OCT 1995)
ESTIMATED QUANTITIES, VAAR 852.216-70 (APR 1984)

(R4, tab 5)

Relevant parts of the Contract Schedule (Blocks 19-24 of SF 1449) include the following:

There are Ground Ambulance patient transportation contracts available to the VA Medical Center (VAMC), Twin Ports Outpatient Clinic (TPOPC) and Community Based Outpatient Clinics (CBOCs); the Government reserves the right to solely determine how patients are to be transported. However, all Handicapped Transportation requests will be offered to the Contractor.

Provide Transportation of the Handicapped (primarily by wheelchair) for the VA Medical Center (VAMC), Minneapolis, MN 55417, the Twin Ports Outpatient Clinic (TPOPC), Superior, WI 54880 in accordance with the Specifications of this Request for Proposal. Comply with U. S. Interstate Commerce Commission required insurance liability coverage for out-of-state trips (Wisconsin, Iowa, Dakotas, etc.)

For VAMC [Minneapolis], historical data reflects an average of 1140 trips per month, or in 20 work days, and average of 57 trips per day; however trips per day have ranged as low as 34 and as high as 70. TPOPC averages 2 trips per day.

For VAMC [Minneapolis], 65% to 70% of trips are 25 miles or less for local metropolitan transports. Out-of-State trips are estimated at 10% of total trips; out-of-state mileage is estimated at 18% of total mileage.

For TPOPC, approximately 75% of trips are local or not distant from Superior, Wisconsin; about 25% of trips from TPOPC are from TPOPC to VAMC [Minneapolis].

(R4, tab 5)

The Contract Statement of Work reads:

Provide sufficient vehicles, drivers and attendants when required to transport handicapped patients. Drivers, attendants, and vehicles must meet the qualifications standards herein.

(R4, tab 5)

The Contract Specifications cover only the requirements for wheelchair vans, the necessary qualifications of drivers and attendants to accompany the vans, and the procedures for transporting wheelchair patients. The

Specifications required MAT to maintain a fleet of wheelchair vans and drivers sufficient to meet the Contract maximum response time requirement of one hour. (R4, tab 5)

Mr. David M. Drier, the President of MAT during the term of the Contract, acknowledged that the Contract was for “wheelchair patients” and at the hearing testified that that the Contract was for wheelchair patients and not for litter transportation or taxi services. Mr. Drier, in responding to a question of why the VA should have offered MAT litter and taxi trips, stated that MAT could have subcontracted those services as it did at TPOPC. (R4, tab 13; Tr. pp. 54-55)

MAT held a predecessor contract to this Contract for the period July 1, 1993 through September 30, 1996. The predecessor contract described the services to be provided as “transportation of the handicapped (primarily wheelchair)” in essentially the same language used in the instant Contract. (R4, tabs 1, 36)

The Contract estimates were developed by Mr. Don D. Taylor, a program clerk in the travel office at VAMC Minneapolis. Mr. Taylor’s responsibilities included monitoring transportation services provided at VAMC Minneapolis and TPOPC. In the normal course of performing his duties, Mr. Taylor maintained a computer generated “spreadsheet” containing the actual monthly invoiced billing by the various transportation service providers. This information was designed to assist the budget office at the Patient Family Center at VAMC Minneapolis, the organization responsible for developing and funding VAMC Minneapolis transportation contracts. In addition, Mr. Taylor was responsible for developing estimates of transportation requirements for the Patient Family Center for their use in making requests for contracting actions by the procurement office at VAMC Minneapolis. Mr. Taylor developed the Contract estimate by averaging the actual yearly number of wheelchair van (WC)

trips for FYs 96-99. The number of WC trips provided at VAMC Minneapolis in those years ranged from a low of 13,512 to a high of 13,612. At TPOPC, the number of WC trips in FY 96-99 ranged from a low of 71 in FY 96 to a high of 353 in FY 99. Mr. Taylor's estimate was reviewed and analyzed by various individuals in the VA, including Mr. Jeffrey Skramstad, the director of the Patient Family Center and was determined to be reasonable for use in the RFP. Since the RFP was issued in July 1999, the figures used for FY 99 included in the average were estimates extrapolated by Mr. Taylor from actual WC trips for the period October 1, 1998 through June 30, 1999. (R4, tabs 3-5, 17, 22, 36; Exh. A-1; Tr. pp. 13-15, 18-25, 27, 60)

In accordance with the terms of the Contract, the VA notified MAT on June 28, 2000 of its intent to exercise Option 1 of the Contract and invited MAT's "questions" concerning the intended option exercise. Although the number of trips it was providing was falling short of the estimates and although MAT had attempted unsuccessfully to obtain the VA's agreement to an increase in the Contract mileage rate due to fuel price increases beginning in January 2000, MAT interposed no objections or questions to the VA's exercise of Option 1. The VA exercised the Option for FY 01 on August 7, 2000. (R4, tabs 6, 10, 12, 36)

In addition to wheelchair van transportation, VAMC Minneapolis provided several classes of what it termed "special transportation" services to its patients including air ambulance, critical care, advanced life support and basic life support ambulances and litter vans. It also authorized reimbursement to patients for travel by "common carrier," including taxi transportation. WC transportation services were available for patients classified by the VA as "wheelchair bound." A wheelchair bound patient is one who can not transfer from a wheelchair to a vehicle on his or her own. A patient's eligibility to receive

special transportation services and the level of those services was determined by VA health care providers who would evaluate the patient's condition in accordance with the VA's "Beneficiary Travel" regulations and provide the necessary information to the VAMC Minneapolis Patient Family Center. The Patient Family Center would coordinate the transportation services for patients and periodically update a patient's continued eligibility for services through the health care provider. Patients classified as "ambulatory" could be authorized taxi transportation but would not ordinarily be eligible for special transportation. (Exh. G-1, G-2, Tr. pp. 32, 36, 39, 43-45)

WC transportation services are considered the lowest level of "Special Transportation." If a particular level of special transportation was authorized and the special transportation source was unavailable, the next higher level of transportation service could be utilized. Likewise, in the case of taxi transportation, if a patient is authorized transportation by taxi and a taxi was unavailable, VAMC Minneapolis could call the WC services contractor to provide the transportation. The WC service contractor is not called, however, if a patient is required to remain recumbent and was authorized litter transportation services, the next level of special transportation above WC transportation. Mr. Drier testified that MAT "possibly" could have provided litter transportation services. There is no evidence MAT ever provided any litter transportation services. (Tr. pp. 38-39, 44, 52)

During the term of the Contract, VAMC Minneapolis modified its procedures to permit patients authorized taxi travel to contact taxi companies directly to arrange the transportation. This replaced a cumbersome system wherein the patient requiring transportation would contact the Patient Family Center; the Patient Family Center would call the taxi company, arrange a ride and then call the patient back to relay the information. In some cases, patients

classified by VAMC Minneapolis as ambulatory, but who used wheelchairs as walkers or as a matter of personal comfort would utilize taxi transportation. (Tr. pp. 46-50)

In FY 00, VAMC Minneapolis expended \$98,559 for taxi transportation and \$36,556 for litter transportation; the FY 01 expenditures, respectively, were \$193,856 and \$36,241. (Tr. pp. 37)

On February 28, 2001, MAT requested an increase to the Contract trip price from \$29.00 to \$44.29, retroactive to October 1, 1999, because the actual number of trips in the period October 1, 1999 through January 31, 2001 was 4,133 less than the Contract estimate. MAT explained that the requested price increase would reimburse it for the revenue deficit it experienced because of the 4,133 trip deficit. The Contracting Officer, citing the Contract terms, denied MAT's price increase request on March 21, 2001. On March 23, 2001, MAT informed VA that it would discontinue service on March 31, 2001 because of "lack of resources." After discussions with MAT and determining that there was no alternate source for WC transportation services immediately available, the VA, on April 1, 2001, modified the Contract per trip price from \$29.00 to \$44.29 for services performed April 1, 2001 to September 30, 2001. (R4, tabs 13, 16, 19, 20, 36; Tr. pp. 63-65)

For VAMC Minneapolis, MAT performed 10,973 WC trips in FY 00 and, adding mileage charges, billed a total of \$663,742. In FY 01, MAT performed 10,484 WC trips, which, with mileage charges, resulted in total Contract revenue of \$660,789 (this total includes 5,472 trips at the changed per trip price of 44.29). The combined total of trips estimated in the Contract for FYs 00 and 01 at VAMC Minneapolis was 27,500; the actual combined number of trips for those FYs was 21,457, a 22% decrease. Payments to MAT for services provided totaled

\$1,324,531 for FYs 00 and 01; the Contract estimated price for WC Trips and mileage for VAMC Minneapolis for the two FYs was \$1,662,300, an 18% shortfall. (R4, tabs 14, 36)

Having identified that its requirements for WC trips was substantially reduced and because of fluctuating and uncertain fuel prices, VAMC Minneapolis informed MAT that it would not exercise the second Contract option and would resolicit its WC transportation requirements. The VA issued RFP No. 618-24-02 on July 20, 2001 soliciting proposals for FY 02. The RFP used an estimated amount of 10,500 trips and 375,000 miles. Although MAT submitted a proposal to provide the FY 02 services, the VA awarded the WC transportation contract for FY 02 to a different provider at a price of \$20.00 per trip and \$1.92 per mile, an estimated annual price of \$930,000. (R4, tabs 22, 36)

DISCUSSION

In the COMPLAINT, MAT asserted that the VA breached the Contract in two ways. The first asserted breach was that the VA negligently prepared the estimate for the number of WC trips reflected in the Contract. MAT's alternative theory of breach was that the VA used sources other than MAT to provide WC transportation services. In its BRIEF, MAT abandons its claim that VA negligently prepared the estimate of its WC transportation requirements. It also abandons any claim that WC transportation was provided by other sources. Instead, MAT now avers that it was contractually entitled to provide litter transportation and taxi transportation services and that the VA failed to order these services from MAT. In effect, MAT asserts that the VA obtained "handicapped" transportation services from sources other than MAT in violation of the terms of the Contract.

MAT concedes that VA was not negligent in the preparation of estimates of its WC transportation requirements for the base and option year. The concession is well advised in light of the evidence showing that the Government's estimate had a reasonable basis in fact and in the complete lack of evidence in the record calling into question the reasonableness of the Government's estimate. *Hi-Shear Technology Corporation v. United States*, 356 F.3d 1372 (Fed. Cir. 2004).

Under this ID/IQ requirements contract, had the VA engaged the services of another contractor to provide for transportation for which it contracted MAT during the Contract term, the VA would be in breach of the Contract. *Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 1328 (Fed. Cir. 2003); *Hi-Shear Technology Corporation v. United States*, 356 F.3d 1372 (Fed. Cir. 2004).

MAT raises the issue of what transportation service it contracted to provide by asserting it was entitled to provide all of the requirements for "handicapped" transportation at VAMC Minneapolis and TPOPC. To MAT, this results in its position that, in the face of the WC patient transportation shortfall, the VA had to acquire litter and taxi transportation from MAT during the term of the Contract. This interpretation translates to a claim of \$367,212, the total the VA paid for taxi and litter transportation during the Contract term. MAT seeks our agreement with its interpretation of the Contract, raised for the first time in its BRIEFS that it had contracted to provide not only all of VA's WC transportation requirements but also the litter and taxi transportation requirements which the VA failed to obtain from MAT.

In interpreting contracts, we are constrained to read the contract as a whole, giving meaning to all its parts. Our role in interpreting contract language is to give the language "that meaning that would be derived from the contract by

a reasonably intelligent person acquainted with the contemporaneous circumstances.” *Hol-Gar Mfg. Corp. v. United States*, 169 Cl. Ct. 384, 351 F.2d 972, 975 (1965).

That oft stated and standard rubric of contract interpretation is more expansively stated in *Julius Goldman's Egg City v. United States* as follows:

We follow the established general rules that provisions of a contract must be construed as to effectuate its spirit and purpose, that it must be considered as a whole and interpreted so as to harmonize and give meaning to all of its provisions, and that an interpretation which gives reasonable meaning to all parts will be preferred [over] one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result.

697 F.2d 1051, 1058 (Fed. Cir. 1983), *cert. denied*. 464 U.S. 814 (1983).

The RFP from which the Contract resulted solicited “transportation of the handicapped.” The Contract Scope of Work required MAT to provide vehicles, drivers and attendants to transport “handicapped patients.” The Contract Schedule references “transportation of the handicapped (primarily wheelchair)” and the Contract specifications deal exclusively with the equipment and maintenance of wheelchair vans and the qualifications of drivers and attendants to staff those vans.

That the Contract, on its face, is less than a model of precision and clarity in regard to which “handicapped” patient transportation the VA was required to order from MAT is obvious. The term “handicapped” is nowhere defined in the Contract. The Schedule states, on one hand, there are other “ground ambulance” contracts available to the VA and reserves to the VA the right to determine how

patients are to be transported. However, on the other hand, the Schedule also states that all “handicapped” transportation requests will be offered to MAT. These Contract terms, when read in context of the priced line items in the Schedule dealing only with wheelchair van pricing and the Contract Specifications which exclusively addresses requirements for wheelchair vans and the qualifications of the drivers and attendants staffing the vans, creates a question of what services the VA was contractually obligated to order from MAT.

We return to the *Hol-Gar* rubric that we are to interpret the Contract language as “a reasonably intelligent person acquainted with the contemporaneous circumstances” to discern the intent of parties, or, as stated by the Court of Claims:

[t]he context and intention [of the contracting parties] are more meaningful than the dictionary definition.

Rice v. United States, 192 Ct. Cl. 903, 428 F.2d. 1311, 1314 (1970)

It is appropriate for us to determine the “context” and “contemporaneous circumstances” to ascertain the parties’ intent by looking at the parties’ interpretation of what transportation services the VA was required to order from MAT prior to the dispute. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747 (Fed. Cir. 1999); *Blinderman Construction Co. v. United States*, 695 F.2d 552 (Fed. Cir. 1982).

Mr. Drier, MAT’s President, acknowledged, both during the term of the Contract and in his testimony at the Hearing, his understanding that the Contract was for special transportation for wheelchair bound patients. MAT was an experienced contractor which held a contract under essentially the same terms

for over four years between 1993 and 1996. There was no evidence that MAT either asserted any right to transport taxi or litter patients or actually transported such patients under that previous contract. During the term of this Contract, a period in which MAT was in self-declared serious financial straits because of the shortfall of WC patients to be transported and rising fuel prices, MAT never indicated that it believed it had a Contractual right to transport taxi or litter patients. MAT did not broach the subject even when afforded an opportunity to do so when the VA solicited MAT's "questions" in its notice of intent to exercise the first Contract option. There is no evidence that any contractor other than MAT provided WC transportation services. The notion of MAT's right to provide VAMC Minneapolis' litter and taxi transportation service requirements first emerges in MAT's BRIEF as an attempt to preserve MAT's original breach claim since there is no evidence of either a negligent estimate or of VA using any vendor other than MAT for WC transportation during the term of the Contract.

On the evidence before us we can only conclude that, during performance of this Contract, MAT interpreted the Contract's mandatory ordering provisions as applying only to the ordering of WC transportation services. MAT's contemporaneous interpretation of Contract terms is strong (to the extent of being controlling) evidence that militates against MAT now being permitted to assert breach damages based on a newly asserted and different interpretation.

Blinderman, 695 F.2d 552 (Fed. Cir. 1982); *C.W. Government Travel, Inc. v. United States*, 61 Fed. Cl. 559 (2004); *Simpson Construction Company*, VABCA No. 3176, 91-1 BCA ¶ 23,630; *Servicios Profesionales De Mantenimiento, S.A.*, ASBCA No. 52,631, 03-2 BCA ¶ 52,631; *Ace-Federal Reporters, Inc.*, GSBCA Nos. 13,298-REM, et. al. 02-2 BCA ¶ 31,913.

Thus, although the Contract, in the abstract, may be considered ambiguous, MAT's interpretation of its terms during its performance was consistent with the VA's interpretation that it promised only to order its transportation requirements for wheelchair bound patients from MAT. As a consequence, MAT has neither proven that it was entitled to transport taxi and litter patients nor can it now claim entitlement based on a Contract interpretation wholly unsupported by contemporaneous facts and only recently asserted in its BRIEF.

Finally, citing *Hilton's Cleaners, Inc.*, ASBCA No. 18213, 74-1 BCA ¶ 10,433 and *Walters v. United States*, 131 Ct. Cl. 218 (1955), MAT also argues that the VA breached its duty of fair dealing and good faith by not relieving MAT of its Contract staffing and fleet requirements because of the reduced number of WC trips. We find this argument inapposite since both *Hilton's Cleaners, Inc.* and *Walters* involved circumstances where the Government took express actions reducing the requirements for services for which it had contracted and refused to notify the contractor or permit the contractor to take actions to reduce its costs to meet the reduced requirements. Since the record is clear that the VA's Contract estimate was reasonable, and there is no evidence that the VA took any action to reduce the number of WC trips or even knew why there was a 15% shortfall in WC trips during the two years of Contract performance, it has not breached the Contract by failure to deal with MAT in good faith. *Sentinel Protective Services, Inc.*, ASBCA No. 23560, 81-2 BCA ¶ 15,194.

DECISION

For the foregoing reasons, the Appeal of Metropolitan Area Transit. Inc., VABCA-7022, under Contract No. 618P-2930a, is **DENIED**.

DATE: **April 27, 2005**

RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur:

PATRICIA J. SHERIDAN
Administrative Judge

RICHARD C. WALTERS
Administrative Judge